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Tuesday, November 26, 2002

VIA FACSIMILE AND OVERNIGHT CARRIER (FEDERAL EXPRESS)

Ms. Magalie **Roman** Salas
Secretary
Federal Communications Commission
Office of the Secretary
445-12th Street SW
12th Street Lobby Counter TW-A325
Washington, D.C. 20554

RECEIVED

NOV 27 2002

Federal Communications Commission
Office of the Secretary

RE: Petition for Reconsideration by
Nash County-Rocky Mount Public School System
Of Decision of the **FCC**
DA 02-2837(release date 10/28/02)

FCC Docket Number 96-45
FCC Docket Number 97-21

Dear Ms. Roman Salas:

Enclosed, please find a Petition for Reconsideration of the FCC's decision denying E Rate funding for **Program Year 3** to **the Nash County -Rocky Mount Public School System** plus four copies.

We **are** sending this for filing **via facsimile** transmission (202-418-7361) and **also** by overnight carrier to the above address.

Thank you for your consideration of this matter.

Yours sincerely,

VALENTINE, **ADAMS & LAMAR, LLP**



L. Wardlaw Lamar
Attorneys for the Nash-Rocky Mount
Board of Education

No. of Copies rec'd 2
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Enclosure

Before the
Federal Communications Commission
Washington DC 20554

RECEIVED

NOV 27 2002

Federal Communications Commission
Office of the Secretary

In the Matter of

Petition for Reconsideration)	FCC Docket No. 96-45
Nash County-Rocky Mount Public School System)	FCC Docket No. 97-21
Of Decision of the FCC)	DA 02-2837 (Release date 10/28/02)

Petitioner:	Nash County-Rocky Mount Public School System
Billed Entity Number:	162994
Application Number	201160
FRN	442461

Summary

The Nash County-Rocky Mount Public School System ("the Petitioner") respectfully asks the Federal Communications Commission ("FCC") to reconsider its decision identified as DA-02-2837 (Release date 10/28/02) regarding the E Rate program year 3, 2000-2001, which denied part of our application for E Rate discounts for voice telephone service presented previously by NC Department of Commerce - SIPS

The original application was submitted to the SLD on behalf of the Nash-Rocky Mount Public School System by the NC Department of Commerce and/or ITS as was the Request for Review in this matter.

The Petitioner believes that even if the Administrative Rules for this program were not strictly followed by those who made the application for it, Petitioner respectfully shows the FCC that there was never any intent to defraud, misrepresent or work in bad faith against any of the Rules of the Program. Failure to get the total amount of E Rate discount for Year 3 is an overwhelming detriment to the Nash County-Rocky Mount Public School System, which is still recovering from the effects of Hurricane Floyd which severely damaged many of its facilities and disrupted its schools in the fall of 1999.

We respectfully ask that the FCC reconsider the evidence presented by this Petitioner and allow the Nash County-Rocky Mount Public School System to receive its E Rate discount for Funding Year 3 for telecommunications services.

Statement of Interest

The Applicant is the public school system for Nash County and a portion of Edgecombe County which is located in Rocky Mount (city), North Carolina. Nash County and Edgecombe County are located in eastern North Carolina. Using 2002 census data, 13.9% of county residents are college graduates and 71.8% are high school graduates. This school system's average SAT combined scores for verbal and

math in 2002 was 967 (math - 491; verbal - 476). The annual unemployment rate for 2000 averaged 5.3% and is presently 9.3%.

For Funding Year 3, July 1, 2000 through June 30, 2001, the Petitioner chose the State Master Contract for voice telecommunications service. The billed entity for this service is the North Carolina Department of Commerce - SIPS. The Petitioner's request by the N.C. Department of Commerce for E rate funding of voice telephone service provided by the State Master Contract was partially denied by the SLD and TAPD.

The State of North Carolina and Nash County are currently in a very grave budget emergency. The State is facing a revenue shortfall of approximately \$900 million for the fiscal year that ends June 30, 2001. The next fiscal year looks worse. Loss of the E Rate discount for the Petitioner is therefore potentially devastating for both it and the State. The amount of the above-listed FRN for telecommunications service that was denied by the SLD is approximately \$66,150.

Statement of Relevant Material Facts

For Funding Year 3, the Petitioner by the N.C. Department of Reserve appropriately filed a Form 470 for telecommunications service. In that Form 470, the Petitioner checked Item 7(d) on Block 2 which indicated that it was seeking telecommunications services pursuant to a multi-year contract signed on or before July 10, 1997 but for which no Form 470 had been filed in a previous program year.

For Funding Year 3, the Petitioner chose to get telephone service from the State Master Contract. It filed a Form 471 indicating that choice (Attachment 2) and included several FRNs for voice telephone service of which FRN 442461 was one.

In its Funding Commitment Decision Letter, the SLD indicated that funding was denied for FRN 442461 with Sprint telephone because the "FRN references services that require a posting of a 470 for each funding year."

The underlying carrier for the referenced State Master Contract is Sprint Telecommunications Services doing business as Carolina Telephone Service. The State Master Contract with Sprint/Carolina Telephone was signed on December 18, 1996 to be effective when service was established pursuant to the contract. The contract is a multi-year contract. Our understanding is that under the rules for the E Rate program, a contract signed on or before July 10, 1997 is exempt from the competitive bid requirements for the life of the contract.

The Petitioner by NC Department of Commerce appealed the decision of the SLD to the Universal Service Administrator. The result of that appeal was a partial denial of the requested amount. In denying part of the request, the Administrator stated, "The contract for telecommunications service was signed 12/18/1996 for a term of four years, expiring on 12/18/2000. The contract has an automatic renewal clause whereby it becomes service on a month-to-month basis after expiration. You have not filed a request for funding for the month-to-month services, nor have you provided sufficient documentation to support the contract through the end of the funding year."

Our school system was notified for the first time by the N.C. Department of Commerce late on the afternoon of November 20, 2002 of the DA 02-2837 decision. This information was then first brought to the attention of the undersigned on November 25, 2002.

It appears that certain documents regarding the agreement between the Petitioner and Sprint were never brought to the attention of the SLD and not addressed in the application review prepared by the Office of Information Technology Services, nor were certain boxes checked on the original application so prepared.

Copies of those relevant paperwritings are attached hereto and made a part of this Petition for Reconsideration, they being as Exhibit A, an addendum to the agreement #961218A between Carolina Telephone & Telegraph and Information Technology Services (hereinafter ITS), the entity acting on behalf of the Petitioner, said addendum being dated January 10, 2000 and February 15, 2000 amending the December 18, 1996 agreement to add an additional period of time by extending the expiration date from the end of December 2000 to June 30, 2001 - the period of time in dispute as to the E rate funds. This document is Exhibit A.

The other document - Exhibit B - is a memorandum dated 1/12/2000 from Jerry Spangler to Rick Webb regarding Exhibit A and another such agreement with Bell South.

The Decision DA - 02-2837, released 10/28/02, also addresses the interpretation of the language in the original contract dated 12/18/96 stating that the contract for services contracted for is extended on a month-to-month basis.

The Petitioner respectfully submits that through no fault of its own but because of apparent clerical errors on the part of those acting on its behalf and also because of the convoluted machinations over the interpretation of the "month-to-month" language of the 12/18/96 agreement, and the failure of clerical personnel to check the appropriate box in the form, the Petitioner's school system stands to lose desperately needed funds in the amount of approximately \$66,150.00

Such a loss comes particularly hard at a time when the Petitioner along with all other public school systems in North Carolina is facing draconian cuts and appropriations by the State and is in fact having to refund a significant portion of funding it has previously received.

In further explanation and as a basis for reconsideration, the Petitioner is advised as follows and therefore contends that:

ITS's procurement authority is statutorily limited to executive state agencies. Some non-executive state agencies such as public schools and libraries may procure information technology goods and services directly or use contracts established by ITS. ITS administers a State Master Contract for telecommunications services, including telephone service as described in 47 CFR 54.500(f). ITS clients that are schools or libraries eligible for the E-Rate program and who purchase telephone services through the State Master Contract file Form 471s listing ITS as the billed entity. The service provider listed on the Form 471s is an underlying service provider for North Carolina's Master Contract for telephone service. The Schools and Libraries Division (SLD) does not recognize ITS as a common carrier.

ITS's procurement authority began in January of 2000. The State's Master contract presented previously, and referenced in the relevant applications, was made pursuant to the authority of the N.C. Dept. of Administration, Division of Purchase and Contract. The telecommunications services Master contract in force at that time was a long term contract. Telecommunications services under that Master contract were rebid and a new master contract

was awarded in June of 2001 to begin on July 1 of 2001.

Enabling legislation for ITS passed in 1999 as Senate Bill 222 and codified in Chapter 143B of the NC General Statutes. This expanded ITS's role to include central procurement authority for Information Technology goods and services. At that time, ITS operated as part of the Dept. of Commerce. Subsequently, ITS was transferred by the General Assembly to the Office of the Governor: this was effective in September of 2000. The original legislation has received minor changes, and is presently codified in Article 3D of Chapter 147 of the NC General Statutes; GS §147-33.75 et. seq. The relevant areas of the statute are Part 3, GS §147-33.91 et. seq. and Part 4; GS §147-33.95 et. seq.

Petitioner supplements the record on this matter with this Petition and additional relevant documentation regarding the State Master Contract with Carolina Telephone and Telegraph Company, d/b/a Sprint Telecommunications. Annexed as Exhibit A, is the addendum to the foregoing Master Agreement. This addendum was prepared to conform to the procurement rules and procedures enabled by ITS' new statutory authority for information technology goods and services. ITS lacked procurement authority to engage in modifications to the Spnnt Agreement, to extend, terminate, or otherwise directly effect a change prior to January 1, 2000. The January 2001 addendum simply fixed the term of the Agreement to 54 months to coincide with the end of the State's fiscal year and the anticipated award date of a new Master Agreement. Annexed as Exhibit B, please find ITS' internal routing Memo to obtain signatures for the Spnnt Addendum, Exhibit A.

Section 1.106 of the Commission's rules provides that a petition for reconsideration of an order denying an application for review will be entertained only if: 1) the petition relies on facts which have occurred or circumstances which have changed since the last opportunity to present such matters; or 2) the petition relies on facts unknown to the petitioner until after the last opportunities to present such matters could not, through ordinary diligence, have been learned prior to that opportunity.

Obviously Petitioner did not know of the existence of Exhibits A & B. or of the controversy attendant thereto until November 20, 2002.

The Commission's rules provide that an eligible school, library, or consortium that includes eligible schools or libraries must seek competitive bids for all services eligible for support. Commission rules exempt contracts entered into on or prior to July 10, 1997 from competitive bidding requirements for the duration of the contract. This Petition provides new, and additional information together with an explanation of the application of these Rules in the specific context presented by Petitioner's application for discounts in Funding Year 2000.

Commission rules exempt contracts entered into on or prior to July 10, 1997 from competitive bidding requirements for the duration of the contract. These rules also provide that contracts signed after July 10, 1997 and before January 30, 1998 (the date on which the Schools and Libraries website was fully operational) are exempt from the competitive bidding requirement for services provided through December 31, 1998. This exemption applies only to services provided through December 31, 1998, regardless of whether the contract as a whole extends beyond that date.

Petitioner filed FCC **Forms 471** seeking discounts for **telecommunication** services in **Funding Year 2000**. SLD denied the **funding** requests after concluding that the FCC **Forms 471** did not meet the 28-day competitive bidding requirements.

Petitioners by N.C. Department of Commerce stated that although Block **2**, Item **8** was not checked on its FCC Form **470**, they had checked Block **3**, Item **14**, which clearly indicated that the funding request **was** for "basic telephone service only." It inadvertently indicated that the contract for services was awarded **January 14, 2000**, when the State actually signed the contract in **1996**. Petitioner's personnel did not have a full and complete copy of the Master contract with **Sprint** at the time their Form **471** was filed, nor at the time subsequent appeals were filed.

Appeal was filed with SLD for Petitioner by N.C. Department of Commerce including only a part of the multi-year contract that **was** signed on or before July 10, 1997. The Master agreement (Sprint Agreement) then in force **was** a multi-year contract executed in December **1996**, therefore exempting the users of that Agreement from the FCC's competitive bidding requirement for the duration of the contract. were not required to comply with the competitive bidding requirement.

The SLD indicated that funding was denied for each FRN sought by the Petitioner because the "[t]he 470 cited did not include service of this type, therefore it does not meet the **28** day competitive bidding requirement." This matter was corrected and the correction resulted in partial funding. This correction **was** noted in **DA-02-2837**, paragraph **6**; and resulted in funding for **six** months contracted service ending in December 2000.

SLD explained that Petitioners failed to file FCC Form **470s** requesting funding for month-to-month service and had failed to provide sufficient documentation to show the existence of the contract to the end of Funding **Year 2000**. Revised Funding Commitment Determination Letter **was** sent. In response, Petitioner filed Requests for Review. Petitioner explained that it received telephone service pursuant to the State Master Contract with, Carolina Telephone and Telegraph Company, d/b/a Sprint Telecommunications as the service provider. Petitioners indicated that a contract **signed** on or before **July 10, 1937** is exempt from the competitive bidding requirements for the life of the contract, citing section 54.511 of the Commission's rules in support. The decision in **DA 02-2837** agrees with Petitioners on this point.

SLD interpreted the Sprint Agreement as **having** a term of four years, **with** the Agreement continuing thereafter on a month-to-month basis. SLD interpreted the month-to-month provision as a voluntary renewal clause. The SLD's conclusion on this question was adopted by USAC in **DA-02-2837**. This conclusion, however, is incorrect in light of applicable North Carolina contract law and public procurements. Petitioners also reference the terms of the service agreement, which provide that "[T]his agreement will be automatically renewed and extended on a month to month basis from the referenced termination date unless either party gives written notice to the other of an intention to terminate the agreement. Petitioner maintains that the month-to-month service is not a voluntary extension of the contract but an automatic one.

Like other public procurement contracts, State contracts are terminable at will; where the will of the State may arise for matters of convenience, appropriation, or procurement. The argument of the SLD and USAC would hold that *all* State contracts are therefore ineligible by reason that such contracts are neither for definite terms nor month-to-month – the only elections available on Form **470**. This conclusion is untenable in the context of state procurement laws, state constitutions, and the associated administrative rules governing state procurements.

Our school system chose to receive telephone services from Spnnt under the State Master Contract as permitted by N.C.G.S. §147-33.91 et. seq. ~~Petitioner~~ by N.C. Department of Commerce ~~filed~~ its Form 471 (previously provided as Attachments to their respective prior appeals) indicating its election and included several FRNs for voice telephone service. At the time ~~ITS~~ received procurement authority, it sought an amendment to the Sprint contract to fix the indefinite term (e.g. the month-to-month term) to a fixed term. This is reflected by Exhibit A, showing ITS' internal routing of the Spnnt contract addendum and the addendum. As the Petitioner's Form 471s was due at or about this same date, the Petitioner did not have the ability to include this information in said Forms.

What is of great importance in this Petition is the fact that ~~ITS~~ provided the complete Spnnt contract addendum, annexed hereto as Exhibit A, to the Petitioner for the first time on Wednesday November 20, 2002, after discovering this document among the papers of ITS personnel who do not work in ITS' E-Rate support section. While the diligence of ITS may be in question under 47 CFR 1.106, Petitioner's diligence and unfortunate reliance upon ITS are clear, and complete.

Although Petitioner feels this additional factual information should make it clear that Petitioner's agreement with Sprint by clear contract language did not end until June 30, 2001; however we feel the other issue regarding DA 02-2387 relating to Commission's interpretation of the State Master Contract with Carolina Telephone and Telegraph Company, d/b/a Sprint Telecommunications should also be addressed.

The State Master Contract with Sprint/Carolina Telephone was signed on December 18, 1996 to be effective as a multi-year contract. Under the rules for the E Rate program, a contract signed on or before July 10, 1997, is exempt from the competitive bid requirements for the life of the contract.

47 CFR 54.511 (c) (i) provides "A contract signed on or before July 10, 1997 is exempt from the competitive bid requirements for the life of the contract; . . ." That section of the FCC regulations further provides at (d) (1), "the exemption from the competitive bid requirements set forth in paragraph (c) of this section shall not apply to voluntary extensions or renewals of existing contracts..." (Emphasis added.):

The contract in question (Attachment 3 to the prior appeal) provides at Section 4 that the term of the contract shall be 48 months from the date that service is established. Further, at 4(D) the contract provides:

This Agreement will be automatically renewed and extended on a month to month basis from the referenced termination date, unless either party gives written notice to the other of an intention to terminate the agreement at the expiration of the then current terms. Such notice is to be given not less than thirty (30) days prior to the expiration of the then current terms. (Emphasis added.)

Under North Carolina law, where the language of the contract is plain and unambiguous, the construction of the agreement is a matter of law; a reviewing court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, *Minor v. Minor*, 70 N.C. App. 76, 79, 318 S.E. 2d 865, 867, disc. rev. denied. 312 N.C. 495, 322 S.E. 2d

558 (1984) Contracts are construed according to the intent of the parties, and in the absence of ambiguity, a court construes them by the plain, ordinary and accepted meaning of the language used. Integon General Ins. Corp. v. Universal Underwriters Ins. Co., 100 N.C. App. 64.68, 394 S.E.2d 209, 211 (1990) (Emphasis added).

The plain, ordinary and accepted meaning of "automatic" is "largely or wholly involuntary," Merriam-Webster's Collegiate Dictionary. This is not the plain, ordinary and accepted meaning of the word "voluntary." The plain, ordinary and accepted meaning of "voluntary" is proceeding from the will or from one's own choice or consent. Id.

The contractual term is not a voluntary extension of the contract but an automatic one. The contract continues until someone cancels it. In its denial of the Request For Review, the Wireline Competition Bureau concludes:

conversion from a fixed contract term to month-to-month service is a voluntary extension of the contract, regardless of whether such conversion occurs automatically or by request, because month-to-month status leaves the applicant free to seek service from another provider at the applicant's choice. Therefore, under program rules, an FCC Form 470 must be filed each year for discounts on month-to-month service."

While we respect the opinion of the Wireline Competition Bureau, construction of contract law applicable to this question must be resolved in accordance first with the understanding of the parties to the contract and second with the laws relating to procurements and public contracting in North Carolina. It is clear from Exhibit A that both Sprint and Petitioner understood this agreement ended 6/30/01. Review of such laws reveals that such a conclusion is correct. The term conversion is simply a mutual option to terminate. However, so long as performance is rendered, the obligor remains liable; e.g. the State remained obligated to compensate Sprint for services.

An option to terminate, if granted, does not specify a term of the agreement. The agreement continues so long as performance occurs, and obligates the purchaser. Curt Teich & Co. v. Lecompte, 222 NC 94, 21 S.E.2d 895 (1942).

At the time of this addendum, ITS was conducting a statewide competitive procurement to replace the Master contracts with ILECs, including Sprint. This effort was scheduled for award not later than 6/30/01; and was, in fact, awarded on June 26, 2001.

It is the position of the Petitioner that the contract was not terminated December 18, 2000 but remained in effect until terminated by its written term on 6/30/01. It is further the position of the Petitioner that the contract was properly amended in accordance with North Carolina procurement law and regulations.


STATEMENT OF RELIEF SOUGHT

The Petitioner respectfully asks that the Commission reconsider its decision in DA 02-2837, and determine that the contract for Sprint Telephone service was not terminated in December 2000, and thus remained eligible through its true termination date of June 30, 2001 under FCC regulations.

The Applicant further requests that **the** FCC permit it **to** receive **the E** Rate discount for voice telecommunications service from **Sprint** Telephone service **for Program Year 3**.

*Very***respectfully** submitted **the** 26th day of November, 2002.

VALENTINE, ADAMS & LAMAR, L.L.P.

BY: 

L. Wardlaw **Lamar**

Attorneys for Petitioner

Nash-Rocky Mount **Board** of Education

(dba Nash-Rocky Mount Public School
System)

P. O. Box a47

Nashville, Nonh **Carolina** 27856

Telephone: **(252) 459-1111**

State **Bar** No. 2603

Exhibit A

SPRINT ADDENDUM

AGREEMENT NUMBER 961218-A

AGREEMENT TERM 6 MONTHS

ADDENDUM NUMBER

WITNESSETH:

Whereas, the parties wish to amend that certain Master Agreement* ("AGREEMENT") dated December 18, 1995 by and between CAROLINA TELEPHONE AND TELEGRAPH COMPANY (herein "COMPANY") and Plymancy North Carolina State Government (herein "CUSTOMER").

Now therefore, the parties hereto agree that Agreement is amended as indicated below:

QTY	DESCRIPTION	INSTALLATION CHARGES	MONTHLY RATE	EXTENDED RATE	S&E CODES
1	This extends expiration date	\$ -		\$ -	
	from December, 2000 to	\$ -		\$ -	
	June 30, 2001. All other terms	\$ -			
	and conditions remain the same.			\$ -	
				\$ -	
		\$ -		\$ -	
	SEE ATTACHED ORIGINAL			\$ -	
	MASTER CONTRACT 961218-A			\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	
				\$ -	

TOTAL INSTALLATION CHARGES

TOTAL EXTENDED MONTHLY RATE

*All Terms and Conditions agreed to on the Master Agreement are hereby agreed to and made a part of this ADDENDUM.

CUSTOMER

Commerce - Information Tech Svcs.

BY:

TITLE:

DATE:

Richard E. Webb Chief Information Officer

10-Jan-00

COMPANY:

CAROLINA TELEPHONE AND TELEGRAPH COMPA

BY:

TITLE:

DATE:

Jeffrey A. Pate

Director - Business Market

2/15/2000

Exhibit B

**North Carolina
Department of Commerce
Telecommunications Services
Office of Information Technology Services**

**James B. Hunt Jr., Governor
Rick Carlisle, Secretary**

James W. Broadwell, Director

January 12, 2000

MEMORANDUM

TO: Rick Webb

THROUGH: Ron Hawley
Jim Broadwell
Pat LaBarbara

juo

FROM: Jerry Spangler

SUBJECT: Signature Required on BellSouth and Sprint Contract Extension Documents for Centrex Service

Two original copies of contract extension documents for centrex service from BellSouth and Sprint are attached that require your signature.

The documents were initiated to extend the expiration dates of the original agreements to be coterminous with the end of the fiscal year of the e-rate program as required by the Universal Service Administrative Company, Schools and Libraries Division. All other rates, services, terms, and conditions remain the same as specified in the original agreements. The documents have been marked where your signature is required.

Please return the two signed copies of the addendum to me.

Thank you.

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